NO. 91-7328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

RECEIVED
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6:50 a.m.
OFFICE OF THE CLERK
SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for Petitioner

## QUESTIONS PRESENTED

1.) Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?

2.) If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3.) What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?



## TABLE OF CONTENTS


| | |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 4 |

TABLE OF AUTHORITIES

CASES


| | |
|---|---|
| Beck v. Alabama, 447 U.S. 625 (1980) | 6 |
| Bullington v. Missouri, 451 U.S. 430 (1981) | 6 |
| California v. Ramos, 463 U.S. 992 (1983) | 7 |
| Engle v. Isaac, 456 U.S. 107 (1982) | 6 |
| Ford v. Wainwright, 477 U.S. 399 (1986) | 7 |
| Gardner v. Florida, 430 U.S. 349 (1980) | 7 |
| Kuhlmann v. Wilson, 477 U.S. 436 (1986) | 7 |
| McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1471 (1991) | 7 |
| Murray v. Carrier, 477 U.S. 478 (1986) | 6 |
| Stone v. Powell, 428 U.S. 465 (1976) | 7 |




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Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, LEONEL TORRES HERRERA, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals was announced on February 18, 1992 and has not yet been reported. A copy of the opinion is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of Texas, from which Mr. Herrera took his appeal to the Court of Appeals, is also unreported but a copy is attached as Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

## STATEMENT OF THE CASE

### A. Course of Prior Proceedings

On January 20, 1982, Petitioner was convicted of murder and sentenced to death. The Texas Court of Criminal Appeals affirmed. Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984). On December 12, 1990, Petitioner filed a petition for writ of habeas corpus in the Texas Court of Criminal Appeals. That Court denied relief on May 29, 1991 and denied rehearing on September 18, 1991.

On February 16, 1992 petitioner filed a petition for writ of habeas corpus in the United States District Court for the



Southern District of Texas. The district court granted a stay of execution so as to allow Petitioner to conduct an evidentiary hearing on his claim that executing an innocent person would violate the Eighth and Fourteenth Amendments. The district court also granted a stay to allow Petitioner an evidentiary hearing to demonstrate that there was a violation of Brady v. Maryland. With respect to Petitioner's other claims for relief, the district court granted Respondent's motion to dismiss pursuant to Rule 9(b).

On February 18, 1992, the United States Court of Appeals for the Fifth Circuit vacated the district court's stay of execution holding that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

### B. Material Facts

The facts that the lower court presumed to be true are that Petitioner is innocent of the crime for which Respondent intends to execute him.

## REASONS FOR GRANTING THE PETITION

### THE LOWER COURT DECIDED AN ISSUE OF CONSTITUTIONAL LAW WHICH THIS COURT HAS NOT BUT SHOULD RESOLVE, AND/OR DECIDED AN IMPORTANT MATTER OF LAW AT ODDS WITH THIS COURT'S JURISPRUDENCE

The Fifth Circuit Court of Appeals wrote some new law today. The Fifth Circuit assumed that the State of Texas will execute an innocent person tonight and found nothing constitutionally objectionable about it. The district court, reflecting the standards of decency in this country, had determined that Petitioner, based upon his substantial and eyewitness claims of innocence, was entitled to an evidentiary hearing on his claim of innocence in fact. That judge granted a stay of Petitioner's execution so as to enable the Courts to address Petitioner's claim.

The Court of Appeals accepted as a matter of fact that Petitioner is indeed innocent of the crimes for which he is scheduled to be executed, and so no evidentiary hearing was necessary to prove his innocence. The Court accepted as a matter of fact that Petitioner could prove his innocence. The Court of Appeals then held that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

The rule of law scribed by the lower court in order to vacate the stay of execution is one which, as far as petitioner can tell, has never been embraced by any federal court under current death penalty statutes. According to the lower court,



Texas has no procedure available in post-conviction proceedings to prevent the execution of a person convicted in state court but who proves to everyone that he or she is innocent, and habeas corpus provides no mechanism for protecting that person.[1] This is wrong.

If states are perfectly free under the eighth and fourteenth amendments to execute persons who can prove beyond a reasonable doubt their innocence then this Court should take the responsibility of saying so and then explaining how it is that the death penalty is reliable, reserved for the most deserving, and does not strike like lightning, in conjunction with such a rule.

Petitioner asks that this Court enter an Order staying Petitioner's execution so as to allow him fully to research the novel position taken by the lower court and properly to prepare a petition for writ of certiorari containing the following issues:

1.) Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?

2.) If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3.) What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

---

[1]The lower court noted that Texas law allows newly discovered evidence to be presented at a motion for new trial, but that motion must be filed within less than thirty days of conviction and sentence.

While there has been much debate of late about capital punishment and habeas corpus, there is not yet a groundswell for executing innocent persons. Petitioner believes that a properly prepared certiorari petition could starkly present the issue for the Court, that there would be a high probability of receiving four votes for certiorari, and that the likelihood of success for a proposed rule that executing innocent persons violates the constitution would be high.

Indeed, this Court's rules already protect the innocent. As this Court declared in Beck v. Alabama, 447 U.S. 625, 637 (1980), "the risk [of an unwarranted conviction] cannot be tolerated in a case in which the defendant's life is at stake." See also Bullington v. Missouri, 451 U.S. 430, 445-446 (1981). Recent Supreme Court decisions confirm that claims of actual innocence warrant special attention in collateral proceedings. For example, the Court recently held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) ("[i]n appropriate cases [the principles of comity and finality that inform the concepts of cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration"). The Court similarly recognized the importance of actual innocence in the context of successive petitions, holding that a federal habeas court may



grant review in those cases in which the prisoner establishes "that under the probative evidence he has a colorable claim of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); cf. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1471 (1991) (adopting "cause and prejudice" standard for successive petitions). Indeed, the Court has recognized that the availability of collateral proceedings stems from "the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 428 U.S. 465, 491-492 n. 31 (1976).

The importance of vindicating claims of actual innocence has special force in the death penalty context. As Justice Marshall emphasized in Ford v. Wainwright, 477 U.S. 39[illegible], 411 (1986) (plurality opinion), "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." See also Gardner v. Florida, 430 U.S. 349, 357 (1980) (holding that heightened scrutiny proceeds from the recognition that "death is a different kind of punishment from any other which may be imposed in this country"); California v. Ramos, 463 U.S. 992, 998-999 (1983) (stating that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death

from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

With respect to this Claim in petitioner's case, the constitutional violation is that his execution, as an innocent person, would violate the Eighth and Fourteenth Amendments. If it would violate the constitution to execute someone who was twelve (12) years old at the time of the offense, or someone who was insane at the time of an execution, then, a fortiorari it would violate the constitution to execute an innocent person. A twelve year old killer has killed, as has a killer whose sanity evaporates before execution. If the evolving standards of decency and the due process clause prohibit their executions, then a person who did not kill certainly cannot be executed.

Petitioner requests that this Court enter a stay so as to allow this issue to be properly framed and presented in a petition for writ of certiorari.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Mark Evan Olive
FL. Bar No. 0578553
2804 Glennis Court
Tallahassee, FL 32304
(904) 562-9748

Counsel for Mr. Herrera





NO. 91 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

MOTION FOR STAY OF EXECUTION

---

Petitioner, by undersigned counsel, respectfully moves this Court for an immediate stay of his imminent execution. The grounds in support of this motion are set forth in more detail in the accompanying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for
Petitioner

FEB-19-1992 05:01 PROM

NO. 91 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

LEONEL TORRES HERRERA, petitioner in the above-captioned case, respectfully moves this honorable Court to permit him to proceed in forma pauperis. An affidavit in support of this motion is attached.

Respectfully submitted,


* MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

* Member, Supreme Court Bar


FEB-19-1992 05:01

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AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, LEONEL T HERRERA being first duly sworn depose and say that I am the petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes__ No✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.
   1975 - 1,200 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes__ No✓

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes__ No✓
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes__ No✓

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are depending upon you for support and state your relationship to those persons.
   N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Leonel Torres Herrera

Subscribed and sworn to before me this 11 day of Feb, 1992

Notary

Roland L. Goodrum
My commission expires 5-15-95
Commission Expires 05-15-95

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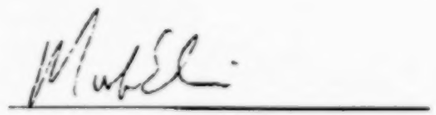
Respondent

---

CERTIFICATE OF SERVICE

I, Mark E. Olive, a member of the Bar of this Court, do hereby certify that I have caused be served by fascimile transmission a copy of the Petition for Writ of Certiorari on the Attorney General of the State of Texas.



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FEB 19 1992
2:55 p.m.
OFFICE OF THE CLERK
SUPREME COURT

February 19, 1992

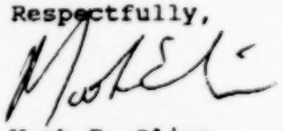
Christopher Vasil, Clerk
United States Supreme Court
Washington, D.C.

A-604

Dear Chris Vasil:

Today Mr. Herrera filed an Application for a Stay of Exeuction Pending Filing and Disposition of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. You have just advised me that the stay was denied by the Court by a vote of 5 to 4. I hereby request on behalf of Mr. Herrera that, due to the exigencies of this litigation, the Court treat the Application for Stay as a Petition for Writ of Certiorari and if the Court grants the Petition for Writ of Certiorari that the Court stay Mr. Herrera's execution pending disposition.

Respectfully,



Mark E. Olive
Attorney for Petitioner
2804 Glennis Court
Tallahassee, Florida 32304
904-644-7710

RECEIVED
FEB 19 1992
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SUPREME COURT

February 19, 1992

A-604

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United States Supreme Court
Washington, D.C.

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Respectfully,

Mark E. Olive
Attorney for Petitioner
2804 Glennis Court
Tallahassee, Florida 32304
904-644-7710

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12:20 p.m.
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SUPREME COURT

A-604

NO. 91 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

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LEONEL TORRES HERRERA,

Petitioner

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF JUSTICE, INSTITUTIONAL DIVISION,

Respondent

---

# APPLICATION FOR A STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

MARK E. OLIVE
Attorney at Law
2804 Glennis Court
Tallahassee, FL. 32304
(904) 644-7710

Counsel of Record for
Petitioner

## I. INTRODUCTION

This case involves a second habeas corpus petition by a death sentenced inmate scheduled to be executed at 12:01 a.m. February 19, 1992. The district court granted a stay of execution so as to allow Petitioner to conduct an evidentiary hearing on his claim that executing an innocent person would violate the Eighth and Fourteenth Amendments. The district court also granted a stay to allow Petitioner an evidentiary hearing to demonstrate that there was a violation of Brady v. Maryland. With respect to Petitioner's other claims for relief, the district court granted Respondent's motion to dismiss pursuant to Rule 9(b).

Petitioner wishes to present at least two claims to the Court via a Petition for Writ of Certiorari. Insufficient time remains between the vacation of the stay by the circuit and the execution to file such a petition. Consequently, Petitioner files this motion for stay and presents the following bases for a stay of execution. First, he is innocent, the lower court accepted the fact of his innocence, and his execution would violate the Eighth and Fourteenth Amendments, and 2.) the lower court erred by not allowing the district court to conduct an evidentiary hearing on Petitioner's Brady claim.



## THIS COURT SHOULD STAY PETITIONER'S EXECUTION SO AS TO ALLOW THE PREPARATION OF A PETITION ON CLAIM OF INNOCENCE

The Fifth Circuit Court of Appeals wrote some new law today. The Fifth Circuit assumed that the State of Texas will execute an innocent person tonight and found nothing constitutionally objectionable about it. The district court, reflecting the standards of decency in this country, had determined that Petitioner, based upon his substantial and eyewitness claims of innocence, was entitled to an evidentiary hearing on his claim of innocence in fact. That judge granted a stay of Petitioner's execution so as to enable the Courts to address Petitioner's claim.

The Court of Appeals accepted as a matter of fact that Petitioner is indeed innocent of the crimes for which he is scheduled to be executed, and so no evidentiary hearing was necessary to prove his innocence. The Court accepted as a matter of fact that Petitioner could prove his innocence. The Court of Appeals then held that executing a person who everyone, including the Courts, knows to be innocent did not run afoul of the constitution.

The rule of law scribed by the lower court in order to vacate the stay of execution is one which, as far as petitioner can tell, has never been embraced by any federal court under current death penalty statutes. According to the lower court, Texas has no procedure available in post-conviction proceedings to prevent the execution of a person convicted in state court but

who proves to everyone that he or she is innocent, and habeas corpus provides no mechanism for protecting that person.[1] This is wrong.

If states are perfectly free under the eighth and fourteenth amendments to execute persons who can prove beyond a reasonable doubt their innocence then this Court should take the responsibility of saying so and then explaining how it is that the death penalty is reliable, reserved for the most deserving, and does not strike like lightning, in conjunction with such a rule.

Petitioner asks that this Court enter an Order staying Petitioner's execution so as to allow him fully to research the novel position taken by the lower court and properly to prepare a petition for writ of certiorari containing the following issues:

1.) Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?

2.) If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3.) What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

While there has been much debate of late about capital punishment and habeas corpus, there is not yet a groundswell for

[1]The lower court noted that Texas law allows newly discovered evidence to be presented at a motion for new trial, but that motion must be filed within less than thirty days of conviction and sentence.



executing innocent persons. Petitioner believes that a properly prepared certiorari petition could starkly present the issue for the Court, that there would be a high probability of receiving four votes for certiorari, and that the likelihood of success for a proposed rule that executing innocent persons violates the constitution would be high.

Indeed, this Court's rules already protect the innocent. As this Court declared in Beck v. Alabama, 447 U.S. 625, 637 (1980), "the risk [of an unwarranted conviction) cannot be tolerated in a case in which the defendant's life is at stake." See also Bullington v. Missouri, 451 U.S. 430, 445-446 (1981). Recent Supreme Court decisions confirm that claims of actual innocence warrant special attention in collateral proceedings. For example, the Court recently held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) ("[i]n appropriate cases [the principles of comity and finality that inform the concepts of cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration"). The Court similarly recognized the importance of actual innocence in the context of successive petitions, holding that a federal habeas court may grant review in those cases in which the prisoner establishes "that under the probative evidence he has a colorable claim of

factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); cf. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1471 (1991) (adopting "cause and prejudice" standard for successive petitions). Indeed, the Court has recognized that the availability of collateral proceedings stems from "the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 428 U.S. 465, 491-492 n. 31 (1976).

The importance of vindicating claims of actual innocence has special force in the death penalty context. As Justice Marshall emphasized in Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion), "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." See also Gardner v. Florida, 430 U.S. 349, 357 (1980) (holding that heightened scrutiny proceeds from the recognition that "death is a different kind of punishment from any other which may be imposed in this country"); California v. Ramos, 463 U.S. 992, 998-999 (1983) (stating that the "Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").





With respect to this Claim in petitioner's case, the constitutional violation is that his execution, as an innocent person, would violate the Eighth and Fourteenth Amendments. If it would violate the constitution to execute someone who was twelve (12) years old at the time of the offense, or someone who was insane at the time of an execution, then, a fortiorari it would violate the constitution to execute an innocent person. A twelve year old killer has killed, as has a killer whose sanity evaporates before execution. If the evolving standards of decency and the due process clause prohibit their executions, then a person who did not kill certainly cannot be executed.

Petitioner requests that this Court enter a stay so as to allow this issue to be properly framed and presented in a petition for writ of certiorari.

## II. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE POLICE SUPPRESSED EVIDENCE OF HIS INNOCENCE AND OF POLICE INVOLVEMENT IN THE OFFENSES

This Court has been provided with all the pleadings heretofore filed in Petitioner's case detailing the police suppression of evidence. In preparation for the evidentiary hearing ordered by the district court, undersigned counsel had Kaul, Jr., interviewed again last night, and he provided an affidavit to counsel regarding police involvement in suppressing the truth at Petitioner's trial. This affidavit was presented tonight to the Fifth Circuit in a motion for rehearing which was denied during a telep[hone conference call between the panel and

counsel. This affidavit further demonstrates the need for an evidentiary hearing, and is reproduced here:

> 1. I am Raul Herrera, Jr. I am the same Raul Herrera, Jr. who signed the affidavit dated January 29, 1992 stating that my father, and not my Uncle Leo, killed Officers Rucker and Carrisalez.
>
> 2. Ever since I was a small child I have known that my father and my grandfather were involved in illegal drug trafficking activities with the Sheriff of Hidalgo County, Brigado Marmalejo. I accompanied my father many, many times when he was involved in these activities. Many times I went with my father on trips to Cameron County to different people's houses or to businesses where by father met with different Department of Public Safety (DPS) officers. These DPS officers wore DPS uniforms and drove DPS cars. My father oversaw the loading of illegal drugs from the houses or businesses in Cameron County into the DPS officers' cars. Then the DPS officers drove the cars, full of drugs, back to Hidalgo County. I drove back with my father and we met the DPS cars usually at my grandfather's ranch on 7 Mile Line Road in Mission, TX or at Sheriff Marmalejo's ranch outside of Edinburg, TX. The drugs were loaded into 18 wheeler trucks that carried produce.
>
> 3. One of the uniformed DPS officers who regularly made these trips with my dad was the man I later learned was named Officer Rucker. Other DPS officers were aware of these activities even if they were not directly part of it.
>
> 4. I remember taking these trips with my father during the year before my father killed the police officers and before my Uncle Leonel's trial. We kept making these trips after my Uncle Leonel's trial, all the way up until my father was killed. DPS officers always acted as security for the drug transfers.
>
> 5. I remember very clearly the period when my Uncle Leonel was tried for the murder of the two police officers. My father was very upset during this time. While the trial was going on, different DPS officers, and other police officers, came to my father's house on 6 Mile Line Road in Mission, TX to meet with my father. They had meetings like this almost every night that the trial went on. Sheriff Marmalejo came to one of these meetings. Usually there were 6 or 7 people altogether, including my father. Each night I saw DPS officers in uniform and other police officers in plain clothes at the house talking to my father. They always talked about Uncle Leonel's trial. They were angry and they wanted to make sure my father and my Uncle Leonel were not going to tell the truth about what really happened to the police officers who were killed. Police officers threatened our family. They were frightened that their drug business would be exposed.
>
> 6. After my Uncle Leonel was arrested and beaten up, I saw a picture in the newspaper of him being brought from the hospital back to the jail. I recognized one of the police officers as one of the men who I had seen snorting cocaine with my father at my grandfather's ranch, my father's house and the Las Vegas Bar in Edinburg, Tx.

This Petition further demonstrates that the district court's order was correct, and that the circuit court's ruling is at odds with this Court's law.

## CONCLUSION

Wherefore, Petitioner respectfully requests that this Court enter a stay of his execution.

**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

No. 92-2114

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FEB 1[illegible] 1992
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SUPREME COURT

LEONEL TORRES HERRERA,

Petitioner-Appellee,

VERSUS

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, DAVIS and JONES, Circuit Judges.

DAVIS, Circuit Judge:

James A. Collins, Director, Texas Department of Criminal Justice, appeals the district court's order staying the execution of Leonel Torres Herrera. Herrera's execution is scheduled for February 19, 1992, between midnight and dawn.

I.

The district court's thorough memorandum opinion and order of February 17 outlines in detail the critical steps which have been taken in this case. In summary, Herrera was sentenced to death on January 21, 1982, following his conviction for capital murder. The Texas Court of Criminal Appeals affirmed Petitioner's conviction and death sentence, **Herrera v. State,** 682 S.W.2d 313 (Tex. Crim.



App. 1984)(en banc). The United States Supreme Court denied certiorari, **Herrera v. Texas,** 471 U.S. 1131 (1985). Petitioner filed a petition for writ of habeas corpus in the 197th District Court of Cameron County, Texas. The convicting court recommended that relief be denied and in August 1985, the Texas Court of Criminal Appeals denied relief. **Ex parte Herrera,** Application # 12,848-02-Texas Criminal Appeals 1985. Thereafter, on August 7, 1985, Herrera filed his first federal petition for habeas corpus, and the district court stayed Herrera's scheduled execution. In October 1989, the federal district court rejected Herrera's habeas petition and dissolved the stay of execution. Herrera appealed that judgment to this court. On June 25, 1990, we affirmed the district court judgment and vacated Herrera's stay of execution, **Herrera v. Collins,** 904 F.2d 944 (5th Cir. 1990). The Supreme Court denied certiorari, **Herrera v. Collins,** __ U.S. __, 111 S.Ct. 307 (1990).

Herrera filed his second application for state writ of habeas corpus on December 12, 1990. On January 14, 1991, the trial court withdrew an earlier order, entered findings of fact and conclusions of law, and denied habeas relief. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's finding and conclusions and vacated a stay of execution.

On December 17, 1991, Herrera filed a petition for writ of certiorari in the United States Supreme Court, which is still pending. Herrera filed the instant application for federal writ of habeas corpus in the district court on February 16, 1992, raising

five claims for relief.[1] The claims that Herrera asserts in his present petition are not duplicative of the claims he asserted in his first petition.

The district court denied all relief on claims 2,3,4 and 5 on grounds of writ abuse. The court initially denied petitioner's **Brady** claim, (which was included as part of his first claim) on grounds that insufficient facts were presented to support this claim. On reconsideration, the district court, however, concluded

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[1] Herrera raises the following claims in the instant habeas petition:

> 1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.
>
> 2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 3. During trial, recesses, and juror deliberations, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.
>
> 4. Petitioner's sentencers were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.
>
> 5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.





that sufficient facts were presented to require a hearing which he scheduled for February 21, 1992. The district court granted a stay of execution pending that hearing. The district court also granted petitioner's motion for a stay of execution to permit petitioner to further litigate in state court the second prong of his first claim -- actual innocence. Alternatively, the court granted a stay pending rendition of an opinion by this court in **May v. Collins**, No. 91-6273. The district court also signed a Rule 54(b) judgment dismissing claims 2-5 and issued a certificate of probable cause as to these claims. Collins filed an appeal from the district court's order granting a stay of execution and moved this court for an order vacating the stay of execution.

II.

For reasons stated by the district court, it correctly rejected petitioner's claims 2,3,4 and 5 because the petitioner has clearly abused the writ as to those claims. **See McCleskey v. Zant**, __ U.S.__, 111 S.Ct. 1454 (1991).

On the **Brady** prong of petitioner's first claim, we agree with the district court's initial conclusion that petitioner neither proffered evidence nor alleged particularized facts that demonstrate that the state withheld any favorable evidence from Herrera before his trial. As stated above, the district court, on reconsideration, concluded that the pleadings and affidavits were sufficient to require a hearing on one issue: whether the state knew that petitioner was innocent of the murder of Officer Carrisalez and withheld that information from Herrera before his

trial. We are not persuaded that Herrera's petition as amplified by his exhibits state specific facts that "point to real possibility of constitutional error." **Blackledge v. Allison**, 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Herrera never identifies any specific evidence that he contends was withheld by the prosecutor before trial. Instead, he relies on affidavits and newspaper clippings to suggest that the prosecutor knew that Raul Herrera, rather than Leonel Herrera, committed the murders. Nothing in any of the exhibits suggests, however, that the prosecutor could have known of the information contained within them at the time of Herrera's trial.

The newspaper clippings upon which Herrera relies make no reference at all to the instant case and do not refer to police corruption in connection with drug activity in South Texas prior to 1985 -- three years after Herrera's trial; further, they contain nothing to suggest that anyone who testified at his trial or any officials in Cameron County, where Herrera was convicted, have ever been involved in any wrongdoing. The affidavit of Raul Herrera, Jr., states that he told a police officer that this father committed the murders rather than Petitioner, but he does not say when or to whom this information was conveyed. Consequently, Herrera has not pled with sufficient particularity the elements of his **Brady** claim to require a hearing. **Id.**

Moreover, the exculpatory evidence on which Herrera relies is a claim that someone else, and not he, committed the offenses of which he was convicted. The person at whom he points the finger is





his brother, Raul, now deceased. Particularly in light of the fact that his brother allegedly committed the offense in the car which Petitioner normally drove, this information clearly was not only available to the defense, but was likely more available to the defense than it was to the prosecution. "**Brady** does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." **United States v. McKenzie,** 768 F.2d 602, 608 (5th Cir. 1985)(citation omitted), **cert. denied**, 474 U.S. 1086, 106 S.Ct. 861 (1986). "When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." **Id., citing United States v. Milstead,** 671 F.2d 950, 953 (5th Cir. 1982). Herrera's attempt to couch this claim in terms of a **Brady** violation therefore is disingenuous.

We therefore turn to the second issue which the district court concluded required it to grant a stay of execution. As a part of his first claim, Herrera contended that he was actually innocent of Carrisalez's murder. Herrera filed a substantially identical claim in the state habeas court. In support of his state habeas claim Herrera attached two affidavits. First, he attached the affidavit of attorney Hector J. Villareal, who had represented petitioner's brother, Raul Herrera, on a charge of attempted murder. Villareal asserted that Raul Herrera confessed to him that Raul, not petitioner, murdered both Rucker and Carrisalez. Herrera also submitted the affidavit of Franco Palacios, one of his brother

Raul's cell mates. Palacios stated that Raul confessed to him that Raul had murdered Rucker and Carrisalez.

When Herrera filed his federal habeas petition, he attached two additional affidavits. The most significant affidavit he attached is the affidavit of his nephew, Raul Herrera, Jr., the son of Raul Herrera. Raul Herrera, Jr. stated that he was with his father on the date of the murders and that he saw his father kill both Rucker and Carrisalez. According to Raul Herrera, Jr., the petitioner was not present when the murders occurred. Raul, Jr. also stated that he told a police officer what occurred but the officer told him never to repeat it. Raul, Jr. did not suggest when this conversation occurred. Raul, Jr. states that no attorney representing the petitioner had ever asked him about the events until recently. His affidavit is dated about two weeks ago, January 29, 1992. Petitioner also included the affidavit of an old schoolmate of the Herrera brothers, who related that Raul, Sr. made a confession to him similar to the one attorney Villareal asserted that Raul had made.

In his federal habeas petition, Herrera asserted that he was entitled to a hearing on his actual innocence claim, particularly in light of Raul Herrera, Jr.'s affidavit. The district court concluded that petitioner should have an opportunity to present the affidavit of the alleged eye witness, Raul Herrera, Jr. The district court then granted the petitioner's stay of execution and retained jurisdiction of the petitioner's "actual innocence" claim until noon, February 21, 1992. The district court directed that it





would dismiss that claim without prejudice on February 21, 1992, provided petitioner had filed a successive state habeas petition so that he could present the additional evidence to that court.

We begin our analysis of the propriety of the district court's stay with the recent admonition of the Supreme Court: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief may be granted.'" **Delo v. Stokes,** 495 U.S. 320, 109 L.Ed.2d 325, 328, 110 S.Ct. 1880, 1881 (1990), (quoting **Barefoot v. Estelle,** 463 U. S. 880, 895, 103 S.Ct. 3383, 3396 (1983)). This court has held that a court should consider four factors in deciding whether to grant a stay of execution:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing or irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

**Byrne v. Roemer,** 847 F.2d 1130, 1133 (5th Cir. 1988)(quoting **Streetman v. Lynaugh,** 835 F.2d 1521, 1524 (5th Cir. 1988)). Although in a non-abuse context the movant in a capital case "need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay.'" **Celestine v. Butler,** 823 F.2d 74, 77 (5th

Cir.)(quoting **O'Bryan v. McKaskle**, 729 F.2d 991, 993 (5th Cir. 1982), **cert. denied**, 483 U.S. 1036, 108 S.Ct. 6 (1987). However, the Supreme Court's recent decision in **Delo v. Stokes**, 495 U.S. at 320, 110 S.Ct. at 1880, makes it clear that, in a case involving a second or subsequent petition, the latter three factors cannot weigh in favor of a stay in the absence of substantial legal claims upon which relief may be granted.

Herrera's claim of "actual innocence" presents no such substantial claim for relief. The rule is well established that claims of newly discovered evidence, casting doubt on the petitioner's guilt, are not cognizable in federal habeas corpus, **see Townsend v. Sain**, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Texas has adopted a similar rule. **See Ex parte Binder**, 660 S.W.2d 103, 104-106 (Tex. Crim. App. 1983). Moreover, the right to collaterally attack a conviction is not a right guaranteed by the Constitution. **Pennsylvania v. Finley**, 481 U.S. 551, 107 S.Ct. 1990, 1994 (1987).

In **Townsend v. Sain**, 372 U.S. 293 (1963), the Court held that a federal habeas court must grant an evidentiary hearing on an allegation of newly discovered evidence only when the evidence "bear[s] upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. 293 (1963). We have recognized the above statement as the Court's holding in at least two cases, **Armstead v. Maggio**, 720 F.2d 894, 896 (5th Cir. 1983)(per curiam), and **Boyd v.**





**Puckett**, 905 F.2d 895, 896 (5th Cir. 1990), **cert. denied**, 112 L.Ed.2d 337, 111 S.Ct. 526 (1990).

Thus, once Herrera's **Brady** claim is rejected, Herrera's "actual innocence" claim does not allege a ground upon which habeas relief can be granted. Under Texas law, a claim of innocence based on newly discovered evidence is grounds for a new trial but such a claim will not support collateral review. **See, e.g. Ex parte Binder**, 660 S.W.2d 103, 105-06 (Tex. Crim. App. 1983)(en banc). Herrera, therefore, has presented no claim for collateral relief under Texas law. Consequently, we can find no legal justification to permit him to present, in piecemeal fashion, additional affidavits to the state court. We conclude that the district court erred in granting a stay of execution for this purpose.

**May v. Collins** relied upon as an alternate ground for a stay, is inapposite. The question in **May** concerns whether a finding of fact by a state habeas court, based upon affidavits alone, is entitled to the presumption of correctness. But the facts at issue in **May** implicated a constitutional defect in May's conviction. No such question is presented in this case.

III.

CERTIFICATE OF PROBABLE CAUSE

The district court issued a certificate of probable cause (CPC) with respect to claims 2-5, although it rejected any relief on these claims. This certificate implies that the district court found that petitioner had made a substantial showing of the denial of a federal right with respect to these claims. **Barefoot v.**

**Estelle**, 463 U.S. 880 (1983). Ordinarily a stay of execution accompanies such a finding and we are uncertain whether the district court inadvertently failed to grant a stay on these claims. Because of the ambiguity of the grant of CPC on claims 2-5 and the failure to grant a stay, the press of time requires us to address the propriety of the district court's issuance of CPC.

For reasons stated by the district court, we fully agree that claims 2,3,4, and 5 are barred because petitioner abused the writ. We find no substantial grounds upon which relief might be granted on these claims. Accordingly, we vacate the certificate of probable cause as improvidently granted. **See Cuevas v. Collins**, 932 F.2d 1078, 1082 (5th Cir. 1991).

MOTION TO VACATE STAY

In sum, on claim 1, we conclude that Herrera has failed to present a substantial ground upon which relief might be granted. **See Delo v. Stokes**, 110 S.Ct. 1880, 1881 (1990). As we stated above, the petitioner failed to allege sufficiently particularized facts to entitle petitioner to relief on his **Brady** claim. The "actual innocence" claim standing alone does not state a claim upon which habeas relief can be granted by either a federal habeas court or a Texas habeas court. We therefore find no legal justification to stay the execution to allow petitioner to litigate further in state court. Accordingly, we grant Collins's motion to vacate the stay of execution entered by the district court.





United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

LEONEL TORRES HERRERA, §
§
Petitioner, §
§
v. § CIVIL ACTION NO. M-92-30
§
JAMES A. COLLINS, DIRECTOR §
TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
INSTITUTIONAL DIVISION, §
§
Respondent. §

ORDER

For the reasons set forth in Memorandum of even date herewith, the Court is of the opinion that the Respondent's Motion for Dismissal pursuant to Rule 9(b) should be GRANTED IN PART and that the Respondent's Motion for Summary Judgment should be GRANTED IN PART and that the Motion for Stay of Execution of the Petitioner should be GRANTED. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Respondent's Motion for Dismissal as to Petitioner's second, third, fourth and fifth claims for relief is hereby GRANTED, and that the Respondent's Motion for Summary Judgment as to the portion of Petitioner's first claim as to any constitutional violation under Brady is GRANTED and the Motion for Stay of Execution be GRANTED as per order of even date herewith.

It is further ORDERED that this Court will retain jurisdiction of the Petitioner's sole remaining claim which is the portion of Claim Number 1 in which he alleges he is actually innocent and that

his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time said claim shall be DISMISSED without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court of his alleged constitutional actual innocence claim along with his evidence on that issue including his recently acquired evidence on that issue. If same be sooner said DISMISSAL shall take effect at the time of filing of said application. Petitioner shall notify this Court and Respondent immediately prior to filing his state application, if same will be filed, so that this Court can sign the appropriate DISMISSAL order on this issue. If this Court should be reversed on the holding on the claim of alleged actual innocence, this Court, as an alternative and independent grounds, would retain jurisdiction of this case until the opinion of the Fifth Circuit Court of Appeals in May v. Collins No. 91-6273 would be handed down and this Court could determine whether the holding in that case would have any application to this case.

The Clark shall send a copy of this Order to Counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE





United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA, §
§
Petitioner, §
§
V. § CIVIL ACTION NO. M-92-30
§
JAMES A. COLLINS, DIRECTOR §
TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
INSTITUTIONAL DIVISION, §
§
Respondent. §

ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992. This Court has issued a Memorandum and Order of even date herewith which disposes of all Petitioner's claims except the portion of his first claim for relief, which the Court has retained jurisdiction over, where he alleges that he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights. This Court considers this latter issue as one which requires that the Petitioner be afforded the opportunity to expeditiously present his constitutional claim of alleged actual innocence along with his evidence, including his most recently acquired evidence on said issue to the state trial court for its

consideration. Therefore, this Court hereby GRANTS a Stay of Execution until noon February 21, 1992 or the time when Petitioner shall file his application with the state trial court, whichever occurs sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as to when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

The Court has considered the applicable legal standard enunciated in Sulvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988) in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).
>
> In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
>
> *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).



The Court finds that a stay in this case for the reasons stated in this ORDER and Memorandum of even date herewith is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED until noon, February 21, 1992 or until the time Petitioner shall file his application with the state trial court on the constitutional claim of alleged actual innocence along with his evidence on said issue including his recently acquired evidence, whichever occurs first. In the event that the stay is not upheld on the prior grounds, this Court would grant, as an alternative and independent ground, a stay until the opinion of the Fifth Circuit Court of Appeals in May v. Collins No. 91-6273 would be handed down and this Court could determine its application to this case.

It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served

upon those persons by the United States Marshal.

The Clerk shall send a copy of this Order to Counsel for Petitioner and Counsel for Respondent.

Done this 17th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE



United States District Court
Southern District of Texas
Filed
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

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| LEONEL TORRES HERRERA, Petitioner, | § | |
| v. | § | CIVIL ACTION NO. M-92-30 |
| JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent. | § | |

O R D E R

Came on for consideration the Petitioner's "Motion to Alter and Amend Judgment and for Reconsideration of Orders Entered February 17, 1992" in which the Petitioner requests reconsideration of the Court's previous granting of the Respondent's Motion for Summary Judgment on the part of his first claim for relief which alleged constitutional Brady violations and the Court being of the opinion that same should be GRANTED and that the Court's previous statements and analysis on said issues in the portion of its previous Memorandum discussing said issues should be withdrawn as the Court is persuaded that there are sufficient factual and legal allegations under the applicable legal standards to necessitate an evidentiary hearing on this matter before this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the

portion of the Court's previous Order granting Summary Judgment on the Petitioner's first claim alleging Brady violations is hereby withdrawn and this cause is set for an evidentiary hearing on the Petitioner's allegations in Claim for Relief Number I on Friday, February 21, 1992, before this Court at 10:00 a.m. in the 9th Floor Courtroom, 1701 West Business Highway 83, McAllen, Texas.

The Clerk shall send a copy of this Order to counsel for Petitioner and to counsel for Respondent.

DONE on this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE





United States District Court
Southern District of Texas
FILED
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

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| LEONEL TORRES HERRERA, Petitioner, | § | |
| v. | § | CIVIL ACTION NO. M-92-30 |
| JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent. | § | |

ORDER SUPPLEMENTING PREVIOUS ORDER STAYING EXECUTION

Petitioner Leonel Torres Herrera was found guilty of capital murder and given a sentence of death by the 197th Judicial District Court of Cameron County, Texas. A Motion for Stay of Execution and a Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254, was filed with this Court on Sunday, February 16, 1992. Petitioner is scheduled to be executed on Wednesday, February 19, 1992.

The Court by Order of even date herewith having GRANTED the Respondent's Motion to Reconsider its granting of Motion to Summary Judgment on the issue addressed in his First Claim for relief alleging constitutional Brady violations by Order of even date herewith and having set an evidentiary hearing on said issues for Friday, February 21, 1992 at 10:00 a.m. before this Court hereby GRANTS a Stay of Execution pending the resolution of said issues by this Court.

The Court has considered the applicable legal standard

enunciated in Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988) with regards to this claim in granting a stay as follows:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *O'Bryan v. McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), cert. denied, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).
>
> In a capital case "while the movant need not always show a probability of success on the merits, he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e. the other three factors] weighs heavily in the favor of granting the stay." *O'Bryan v. McKaskle*, 729 F.2d at 993 (quoting *Ruiz v. Estelle*, 666 F.2d at 856).
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> *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987), cert. denied, ___U.S. ___, 108 S.Ct. 6, 97 L.Ed.2d 796 (1987); see also *Streetman v. Lynaugh*, 835 F.2d 1521, 1524 (5th Cir. 1988) (emphasis added).

The Court finds that a stay in this case is appropriate. It is THEREFORE,

ORDERED, ADJUDGED and DECREED that Petitioner's Motion for Stay of Execution be hereby GRANTED and that Petitioner's execution shall be STAYED pending resolution by this Court of Petitioner's First Claim.

The Court notes that a previous Order granting a Stay of Execution was granted by this Court on February 17, 1992 and the reasons stated in the granting of this Stay of Execution are in addition to and independent to the reasons stated in said Order and shall supplement said Order.





It is further ordered that the Clerk shall give immediate telephonic and telegraphic notice to James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, to the Honorable Ann Richards, Governor of the State of Texas; and to the Honorable Dan Morales, Attorney General of the State of Texas that Leonel Torres Herrera's execution is stayed by order of this Court. A certified copy of this Order shall be subsequently served upon these persons by the United States Marshal.

The Clerk shall send a copy of this Order to counsel for Petitioner and counsel for Respondent.

Done this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED
FEB 18 1992
Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CIVIL ACTION NO. M-92-30

ORDER

On the 18th day of February, 1992, came on to be considered the Petitioner's "Request for Certification Under Rule 54(B), and Application for Probable Cause to Appeal, For Leave to Appeal In Forma Pauperis on Appeal, and for Certification that Appeal is Taken in Good Faith." Having reviewed the motion in light of this Court's Memorandum and Order entered on February 17, 1992 denying the Second, Third, Fourth and Fifth Claims for Relief in Petitioner's Petition for a Writ of Habeas Corpus and this Court having today granted the Petitioner's Motion to Reconsider its previous granting of Respondent's Motion for Summary Judgment on the portion of Petitioner's First Claim alleging constitutional Brady violations, the Court renders the following ruling.

The Application for Certificate of Probable Cause is hereby GRANTED pursuant to 28 U.S.C. § 2253. In addition the Court hereby GRANTS the Petitioner's request for leave to proceed in forma pauperis on appeal and for certificate that his appeal is taken in



good faith and hereby pursuant to Rule 54(b) hereby enters Judgment Dismissing Petitioner's Claims for relief numbered 2, 3, 4 and 5 and this shall be a final appealable judgment on said issues.

The Clerk shall send a copy of this Order to counsel for Petitioner, and counsel for Respondent.

DONE this 18th day of February, 1992, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED
FEB 17 1992
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LEONEL TORRES HERRERA,
Petitioner

VS.

JAMES A. COLLINS,
DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

CIVIL ACTION NUMBER
M-92-30

# MEMORANDUM

Came on to be considered before the Court the Petition for Writ of Habeas Corpus filed by Petitioner, Leonel Torres Herrera (hereinafter "Petitioner") pursuant to Title 28 U.S.C. § 2254, in which relief is sought from a finding of guilty and a sentence of death entered by the 197th Judicial District Court of Cameron County, Texas. Respondent, James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, filed "Respondent's Opposition to Request for Stay of Execution, Motion to Dismiss Pursuant to Rule 9(b) and Alternatively Motion for Summary Judgment and Supporting Brief."

Having considered the pleadings on file, the Court issues the following ruling on the Petition for Writ of Habeas Corpus and the Respondent's responses.



## PROCEDURAL HISTORY

The Petitioner attacks a judgment of the 197th District Court of Cameron County, Texas, dated January 21, 1982, wherein he was convicted of capital murder by a jury and sentenced to death. Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. Herrera v. State, S.W.2d 313 (Tex. Crim. App. 1984) (en banc). Rehearing was denied by the Court of Criminal Appeals without written order on January 16, 1985. The United States Supreme Court denied certiorari. Herrera v. Texas, 471 U.S. 1131 (1985). Petitioner filed a Petition for Writ of Habeas Corpus in the 197th District Court of Cameron County, Texas, which entered an order recommending denial of the Writ. The Texas Court of Criminal Appeals denied Petitioner's state writ application. Ex Parte Herrera, No. 12848-02 (Tex. Crim. App. August 2, 1985).

A Petition for Writ of Habeas Corpus was then filed with this Court on August 7, 1985 and was subsequently denied. Petitioner filed Notice of Appeal and this Court granted a Certificate of Probable Cause. The Fifth Circuit Court of Appeals affirmed this Court's Judgment. Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990). A Petition for Writ of Certiorari to the United States Supreme Court was denied. Herrera v. Collins, ____ U.S. ____, 111 S.Ct. 307 (1990).

The Petitioner subsequently filed a habeas corpus application in the state trial court. The state trial court entered findings of fact and conclusions of law on February 14, 1991 and recommended

that the writ be denied. The Petitioner's writ application was transmitted to the Texas Court of Criminal Appeals which denied all requested relief on the basis of the trial court's findings except one (declining to adopt the trial court's finding of procedural default on Petitioner's claim that the jury could not give effect to the punishment phase evidence) and vacated the stay of execution. Ex parte Herrera, 819 S.W. 2d 528 (Tex. Crim. App. 1991) (Clinton and Maloney, J.J., dissenting). The Petitioner sought rehearing which was subsequently denied. The Petitioner has, on December 17, 1991, filed a Petition for Writ of Certiorari to the United States Supreme Court and a Request for Stay of Execution on February 12, 1992, which are still pending. The state trial court has scheduled the Petitioner's execution for Wednesday, February 19, 1992.

Petitioner filed the instant Petition for Writ of Habeas Corpus with this Court on Sunday, February 16, 1992.

The Petition, which is the Petitioner's second federal habeas Petition, raises five claims for relief pursuant to Title 28 U.S.C. § 2254 as follows:

1. The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.

2. Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer detective in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.





3. During trial, recesses, and juror deliberations, juror-police officer Brassler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

4. Petitioner's sentencer's were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

5. The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

Respondent, as previously stated, has responded to the claims for relief of Petitioner and in addition has filed a Motion to Dismiss pursuant to Rule 9(b) alleging abuse of writ and Motion for Summary Judgment.

## FACTUAL BACKGROUND

The evidence at the trial revealed that on the evening of September 29, 1981, a Texas Department of Public Safety Officer, David Rucker (hereinafter "Rucker") was killed by a gunshot wound to the head. There were no witnesses to the shooting, but Petitioner's social security card was found near the body. Ten minutes later, approximately six miles from where Rucker's body was found, Enrique Carrisalez (hereinafter "Carrisalez") a Los Fresnos, Texas, city police officer, stopped a speeder travelling from the direction of the earlier shooting. As Carrisalez approached the stopped vehicle, the driver shot him in the chest. The officer died nine days later from the wound.

Carrisalez was accompanied by civilian Enrique Hernandez (hereinafter "Hernandez") who witnessed the shooting. Upon attempting to stop the vehicle, Carrisalez called in the license plate number of the car on the police radio. After the shooting, Hernandez radioed in a general description of the suspect's automobile. Immediately afterwards that night, Hernandez was interviewed by police officers.

On the next morning, Hernandez gave a statement to Texas Ranger Bruce Casteel. The police then proceeded to obtain an arrest warrant. On the morning of September 30, just hours after the shooting had occurred, Hernandez was called to the Harlingen police station and shown a display of photographs. From that display, he chose three photographs, one of which portrayed the Petitioner. The following afternoon, October 1, two police officers went to the hospital room of Carrisalez, showed him a single photograph of Petitioner, and asked him three times if he could identify it. Although he could not speak, Carrisalez nodded his head positively identifying Petitioner as the gunman. This same photograph was shown by itself to Hernandez later the same day, who also made a positive identification of Petitioner. The photograph was a mug shot that carried the notation "Edinburg Police Department" suggesting the person was already in custody.

Hernandez was shown another photographic display on October 6, 1981, two days after Petitioner had been taken into custody. At this showing, he positively identified Petitioner. Finally, on



October 24, Hernandez identified Petitioner from a five-man lineup attended by Petitioner's attorney.

Petitioner was arrested on October 4, 1981, and he was taken to the station for questioning. Following the arrest, police searched the Petitioner and found a letter written on the backs of several envelopes, wherein Petitioner discussed the death of both officers. After having been convicted of the capital murder of Carrisalez, Petitioner plead guilty to the murder of Rucker.

Petitioner in the present Petition, claims he is innocent of the murder of both officers and that his brother, Raul Torres, was the one who committed the murders and has offered several affidavits, including one of an alleged eyewitness, in support of his claim of innocence.

## RESPONDENT'S MOTION TO DISMISS UNDER RULE 9(b)

Respondent moves to dismiss this case under Rule 9(b) of the Rules Governing Section 2254 cases in the United States District Court, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The abuse of writ doctrine generally "prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." McCleskey v. Kant, ____ U.S. ____, 111 S.Ct. 1454, 1470, No. 89-7024 (April 16, 1991). In McCleskey, The Supreme Court applied the procedural default

standard to abuse of writ inquiries in the following manner:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appeal for the first time and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.
>
> * * *
>
> Federal courts retain the authority to issue the writ of habeas corpus in a further narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.

111 S.Ct. at 1470 citing Murray v. Carrier, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643 (1986).

Respondent's pleadings sufficiently satisfy the burden imposed in order to plead abuse of writ. The burden shifts and Petitioner must meet the McClaskey standards in order to urge the five claims for relief now alleged. Guided by McClaskey, this Court must consider all of Petitioner's present claims under the procedural default standard. 111 S.Ct. at 1470.

Because the Court will address the abuse of writ and/or procedural default issues with regards to each one of the five claims for relief, the Court will proceed to discuss each claim below.





**CLAIM I**

**THE STATE'S FAILURE TO REVEAL EXCULPATORY EVIDENCE RESULTED IN THE CONVICTION AND SENTENCE OF AN INNOCENT PERSON, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. PETITIONER IS INNOCENT, ANOTHER PERSON HAS CONFESSED TO THE CRIME, AND THE PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS**

In his first claim, the Petitioner presents allegations that maintain his actual innocence of the capital murder convictions. The Petitioner frames part of this claim as a violation of the constitutional principles enunciated in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner alleges, without proof of any evidence, that law enforcement officials knew of exculpatory evidence and withheld it from defense counsel at trial and sentencing. In the alternative he alleges he is innocent of the crime and his execution would violate the eighth and fourteenth amendments and an evidentiary hearing on this claim of innocence must be a full and fair one.

The Petitioner alleges he was not present when either of the two officers was killed. Petitioner avers he had nothing to do with either murder. To substantiate the claim, the Petitioner offers four affidavits. Affiant Hector J. Villarreal represented the Petitioner's brother Raul Herrera, on a charge of attempted murder. According to Villarreal, Raul Herrera confessed to him that he, not Petitioner, murdered both Rucker and Carrisales. Villarreal states that Raul Herrera was murdered in 1984. (See Appendix to Petition, No. 10).

Affiant Juan Franco Palacios states that he was a friend of Raul Herrera. Palacios states that on one occasion, when sharing a cell at the Hidalgo County Jail in 1984, Raul Herrera confessed that he murdered Rucker and Carrisales. (See Appendix to Petition, No. 11). Affiant Jose Ybarra, Jr., an old schoolmate of the Herrera brothers relates a similar confession. (See Appendix to Petition, No. 15). The most recent of the above mentioned affidavits was executed over a year ago and it appears that the Villarreal and Palacios affidavits were presented to the state trial court.

Raul Herrera's son, Raul Herrera, Jr., relates an eyewitness account of the murders in an affidavit executed within the last two weeks. (See Appendix to Petition, No. 16). Raul Herrera, Jr. states he was with his father on the date of the murders and that his father killed both Rucker and Carrisales. Affiant Raul Herrera, Jr. states that the Petitioner was not involved and was not present when the murders occurred. This affiant states that he told a police officer this account, but the officer told him never to repeat it. The affiant states no attorney representing the Petitioner asked him about the events until recently.

Although the state trial court considered a claim of newly discovered exculpatory evidence in the Villarreal and Palacios affidavits, the Petitioner complains the trial court summarily dismissed them without a hearing as being meritless. The Petitioner argues he was entitled to an evidentiary hearing by the trial court on this matter and is especially so entitled in light





of the latest affidavits. However, as already stated, two of the affidavits including the recent alleged eyewitness one have never been presented to the state trial court.

Although one of the Petitioner's complaints under this claim is as a constitutional Brady violation, the Petitioner fails to adequately demonstrate any evidence of withholding exculpatory material by the prosecution. To state a Brady claim, the Petitioner must demonstrate that '(1) the prosecution suppressed evidence that was (2) favorable to the accused and (3) 'material to either guilt or punishment.'" Cordova v. Collins, ___F.2d___, No. 92-2037, (5th Cir. 1992) citing Brady, 373 U.S. at 87. The affidavits offered as 'new evidence' as well as the newspaper articles to which Petitioner refers in this Appendix fail to make any showing that the prosecution even knew about this evidence. The affidavits come from people closely associated with the Petitioner or his brother. The Petitioner has failed to show the first prong of a Brady claim and thus no constitutional violation under Brady. Since this allegation contains evidence which was acquired after the first federal habeas petition in 1985 this Court will not use the abuse of writ standard but will grant the Respondent's Summary Judgment Motion on this issue.

With regard to the second portion of Petitioner's claim in which he claims actual innocence and constitutional violations of his eighth and fourteenth amendment rights thereto, the general rule is that if a petitioner presents a substantial allegation of newly discovered evidence, a federal habeas court must grant an

evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 313; 83 S.Ct. 745, 757 (1963). A petitioner is entitled to an evidentiary hearing when the state court did not provide a full, fair, and adequate hearing. Id. However, newly discovered evidence bearing directly upon guilt or innocence is not properly presented in a petition for habeas corpus, unless the petition implicates a constitutional violation. Shaver v. Ellis, 255 F.2d 509 (5th Cir. 1958) and Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) reh'g *denied, en banc* 747 F.2d 1468, *cert. denied* 470 U.S. 1088 (1985). As already stated, it is important to note that two of Petitioner's affidavits alleging his innocence including the very recent one of the alleged eyewitness have not been presented to the trial court.

This Court realizes that the Petitioner's execution is imminent and feels that, in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process, he should be afforded an opportunity to present his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue to the state trial court and that the state court should be afforded the opportunity to consider said issues.

The Court realizes the state court is normally bound by a "rule of habeas abstention" preventing the state court from considering the merits of a habeas petition when a federal habeas proceeding is pending on the same matter. See May v. Collins, 948 F.2d 162, 169 (5th Cir. 1991) cert. *denied* 60 U.S.L.W. 3479 (U.S. 1992). As stated, the Court is also cognisant of the time





constraint faced by Petitioner. The Court believes the prudent course here is for this Court to grant the Petitioner's stay of execution request and for this Court to retain jurisdiction of the portion of Petitioner's first claim in which he alleges he is actually innocent and that his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time the Court shall DISMISS said claim without prejudice provided Petitioner shall have filed by then an appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his recently acquired evidence on said issue. Said DISMISSAL shall be sooner and shall take effect at the time of filing of said state application if same be filed sooner.

In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay, would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved.

**CLAIM II**

**PETITIONER WAS TRIED AND SENTENCED TO DEATH FOR THE MURDER OF TWO POLICE OFFICERS BY A JURY WHOSE MEMBERS INCLUDED A POLICE OFFICER DETECTIVE IN AN OFFICE THAT INVESTIGATED THE CASE, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.**

**CLAIM III**

**DURING TRIAL, RECESSES, AND JUROR DELIBERATIONS, JUROR-POLICE OFFICER BRESSLER WAS ARMED, AND AT LEAST ONE JUROR NOTICED; IN ADDITION, AND CONTRARY TO HIS SWORN STATEMENTS DURING VOIR DIRE, THIS OFFICER KNEW ONE OF THE VICTIMS. THESE FACTS REVEAL THAT PETITIONER'S CONVICTION AND DEATH SENTENCE OCCURRED IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.**

In Claims II and III, which will be discussed together, Petitioner claims his sixth, eighth and fourteenth amendment rights were violated as a result of the service of Brownsville Police Detective Joseph J. Bressler (hereinafter, Bressler) as a juror in his case. Some conclusory statements are made about the service of three other jurors (two of whom were relatives of police officers and another an acquaintance of Rucker) but the two claims are worded on the service of Bressler.

The gist of the Petitioner's complaint as to Bressler's service appears to be centered on mere speculation on the Petitioner's part unsubstantiated by any evidence or law. The Petitioner complains that the service of Bressler created an appearance of unfairness and caused someone to serve who was automatically biased and would believe law enforcement officials and in addition created a constitutionally impermissible risk that a sentence of death would be imposed. In addition, Petitioner





presents an affidavit with hearsay evidence that a juror (who has refused to sign an affidavit to that effect) had indicated to an investigator for Petitioner that Bressler was armed during the proceedings and had known Rucker although during voir dire he claimed he did not. (See, Appendix to Petition No. 13). An additional hearsay affidavit has been filed alleging that another juror had stated that Bressler, at the start of jury deliberations, expressed his view that the Petitioner was guilty and had stated facts about Petitioner that were not in evidence and that his views had an influence on her decision. Said juror has also refused to sign such an affidavit and, in fact, when requested to do so, stated that she would not sign such an affidavit as it was not true. (See, Appendix to Petition No. 14).

The Petitioner argues that, although the trial court alleged these claims were procedurally defaulted, the Petitioner properly presented them to the court which ruled on their merits. The Petitioner further asserts these claims implicate a fundamental miscarriage of justice and should not be dismissed before consideration on the merits. This Court finds that Petitioner has not established cause and prejudice under either procedural default or abuse of writ. The Court further finds that these claims do not implicate a fundamental miscarriage of justice as they do not embrace constitutional violations resulting in the conviction of one actually innocent of the crime or sentence.

The Petitioner's trial counsel moved for a mistrial based, in part, upon Petitioner's dissatisfaction with the selection of

Bressler and the other three as jurors. Trial Record, vol. 12, p. 3. However, the trial court in the most recent state habeas petition, specifically found that the Petitioner was procedurally barred from making these claims, as trial counsel made no direct challenge for cause to Bressler but rather simply asked for an additional preemptory challenge. Ex Parte Herrera, No. 71,171, Amended Order of February 14, 1991. The Court of Criminal Appeals found the trial court's conclusions were supported by the record. Ex parte Herrera, 819 S.W.2d 528 (Tex.Crim.App. 1991).

The Court similarly finds that the Petitioner has not established cause for failure to raise these claims in his earlier federal petition. Unquestionably, all of the facts surrounding Bressler's selection and service upon which Petitioner now bases his second and third claims, became known during jury selection and as to any which were not Petitioner has not shown cause as to why they were not discovered before the Petitioner filed his first federal habeas Petition in 1985. The same applies as to any complaints about the other three jurors. In short, nothing prevented Petitioner from raising Claims II and III earlier. Petitioner fails to offer any evidence to aid in establishing cause.

The Petitioner seeks to skirt these impediments by asserting Claims II and III are not barred as they involve a fundamental miscarriage of justice. The Court questions whether the Petitioner has even identified a constitutional violation which would lead to the conviction of an innocent person here as required by McCleskey.





While Petitioner states his sixth, eighth and fourteenth Amendment rights were violated, the Court as previously noted has not been cited anything in law or evidence other than speculation and conclusion that would lead to the conclusion of any constitutional violation.

In addition, Petitioner has not indicated that he has any evidence, hearsay or otherwise, that even if Bressler did carry a gun during his service as a juror, it affected any other juror, nor has he presented other than hearsay any evidence to the effect that Bressler did know Rucker contrary to his own sworn statement during voir dire and that even if he did it affected any juror's decision.

Petitioner, having failed to satisfy the McCleskey standard as to Claims II and III, must have said claims dismissed as an abuse of writ.

## CLAIM IV

**PETITIONER'S SENTENCER'S WERE PRECLUDED FROM CONSIDERING EVIDENCE WHICH COUNSELED IN FAVOR OF A SENTENCE LESS THAN DEATH, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.**

In this fourth claim for relief, Petitioner asserts, under Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989) that: (1) the jury was precluded from considering mitigating circumstances which were in evidence; and, (2) other, available evidence was not presented because of counsel's understanding of the Texas capital sentencing scheme. He argues that had the jury been able to consider this evidence beyond the scope of the two special issues on deliberateness and future dangerousness, it could have imposed

a life sentence. Therefore, Petitioner argues, the Texas statute was applied in violation of his sixth, eighth and fourteenth amendment rights. The Respondent argues that raising this issue in this second federal habeas petition as opposed to raising it in the first federal habeas petition in 1985 constitutes abuse of the writ and under Rule 9(b) the claim should be dismissed.

Petitioner asserts evidence of his military service, his remorse, his mental instability, his substance abuse, his caring family, and police brutality after his arrest is supported by the record. While conceding that this evidence could have been considered under the special issues of the Texas capital sentencing scheme, the Petitioner claims the special issues allowed only an aggravating effect upon future dangerousness.

Petitioner also contends evidence such as psychological evaluations were not pursued because of trial counsel's understanding of the effect to be given mitigating circumstances under the special issues. Petitioner alleges counsel believed any such evidence would only contribute to affirmative answers on the special issues. As a result, counsel did not bring evidence of an abusive father, head injuries, and untreated illnesses to the jury. The Petitioner has recently secured a psychological evaluation which asserts the Petitioner suffered from neurological impairment and Post Traumatic Stress Disorder (See, Appendix to the Petition No. 9).

As stated previously, McCleskey held that Rule 9(b) provides that a second or successive petition for federal habeas relief





which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the Petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice. The McCleskey Court went on to say that a petition may make a valid cause showing where a particular legal theory was not yet a viable option for the Petitioner.

Petitioner argues that his pre-Penry belief that courts had correctly interpreted the Texas capital punishment statute and that presentation of evidence as to the Petitioner's mental incapacities and other alleged mitigating circumstances would only support a 'Yes' in response to the special issues presented to the jury for consideration, is cause for the Petitioner's failure to raise this claim earlier.

There is no merit to the Petitioner's argument that his understanding of the law prior to Penry explains his failure to make this claim previously in his 1985 federal habeas petition.

The Fifth Circuit in Cuevas v. Collins, 932 F.2d 1070, (5th Cir., 1991) found that Penry claims have been made since 1980 when the Texas Court of Criminal Appeals found that there was no need for an explanatory jury charge with regard to the consideration of mitigating evidence during the sentencing phase of a capital murder trial. Quinones v. State, 592 S.W.2d 933, 947 (5th Cir. 1980). The Fifth Circuit held,

> [i]n Selvage v. Lynaugh, 842 F.2d 89, 94 (5th Cir. 1988), we found that as early as April 1980, a "Penry" contention, as it later became known, was "not a recently found legal theory not knowledgeable by competent

> counsel". . . . There is no basis for asserting that it would have been futile for Cuevas to have pursued his Penry claim in his first federal habeas petition. He did so in the federal district court but abandoned the argument on appeal. Nor is the fact that the law is "developing" of aid to Cuevas. The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S.527, 106 S.Ct.2661, 2667, 91 L.Ed.2d 434 (1986).

Cuevas at 1082.

Thus, Petitioner's argument that the law in 1985, when Petitioner could have included this claim with his first federal habeas petition, did not provide for a viable Penry claim, must fail as Petitioner has failed to show any cause for failure to have raised these issues then.

The Petitioner alternatively argues that to bar his Penry claim may give rise to a viable fundamental miscarriage of justice claim. The Court is cognizant that the type of cases where a fundamental miscarriage of justice would apply is in "extraordinary instances where a constitutional violation has caused the conviction of one innocent of a crime." McCleskey, at 1470.

The Supreme Court has extended the term "innocent of a crime" to include cases where one would be "innocent" of a death sentence. As the Supreme Court stated in Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 1217 n.6 (1989):

> In Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." We made clear, however, that such a case would be an "extraordinary" one, ibid., and have since





> recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial. Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). We do not undertake here to define what it means to be "actually innocent" of a death sentence.... Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received.

This Court has faced this issue before in Bird v. Collins, in a case where the petitioner was alleging evidence of psychological, sociological and mental condition which he claimed made him innocent of the death sentence and granted a stay pending oral argument on this issue. The Fifth Circuit in Bird v. Collins, 943 F.2d 629 (5th Cir. 1991) at p. 630 vacated this Court's decision to stay the execution pending oral argument and stated as follows:

> The district court hesitated over the expressed uncertainty of the Supreme Court in translating the concept of actual innocence to innocence of a death sentence. The district court quoted from *Smith v. Murray*, 477 U.S. 527, 539, 106 S.Ct. 2661, 2884, 91 L.Ed.2d 434 (1986) that:
>
> > We do not undertake here to define what it means to be "actually innocent" of a death sentence.... Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case." [*Murray v. Carrier*, supra. 477 U.S. [478] at 496, 106 S.Ct. [2639], at 2650, [91 L.Ed.2d 397 (1986)], into an all too ordinary one.

We recently acknowledged this uncertainty in *Cuevas v. Collins*, 932 F.2d 1078 (5th Cir. 1991). However we also concluded that whatever may be the "extraordinary" level of *Penry* type evidence not given expression under the

question of deliberateness and future dangerousness sufficient to render a petitioner "actually innocent" of a sentence as opposed to error that "might have affected [its] accuracy", it was not presented by Cuevas. We reach the same conclusion here.

This Court, therefore, notes that here as in Bird whatever the extraordinary level of Penry type evidence not given expression under the questions of deliberateness and future dangerousness sufficient to render a Petitioner actually innocent of a sentence as opposed to error that might have affected its accuracy is not present and therefore this claim must be dismissed as an abuse of writ.

CLAIM V

THE TRIAL JUDGE WRONGFULLY REFUSED TO ALLOW PETITIONER TO SPEAK AT ALL DURING PETITIONER'S TRIAL AND CAPITAL SENTENCING PROCEEDING, THEREBY VIOLATING PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS.

The Petitioner contends he was restrained by the trial court from exercising any constitutional rights. The Court, responding to an outburst by Petitioner, instructed him not to disrupt the proceedings or the court would have him placed in an observation room. Petitioner now protests, without any evidentiary support, that this action rendered him effectively mute and unable to participate in his defense.

The Petitioner derives this claim from events readily discernible in the record. As already stated, at one point during voir dire, the Petitioner spoke out, complaining of the proceedings. The trial court ordered that he be placed in the





observation room where he could see and hear the proceedings without being disruptive. This transpired before a noon recess. Trial Record, vol. 10, p. 61-63. After reconvening, with the Petitioner apparently back at counsel's table, the court again cautioned him not to be disruptive or he would return to the observation room. The court noted it was in the Petitioner's interests to be able to consult with counsel. The Petitioner acknowledged comprehension of the court's warning. Trial Record, vol. 10, p. 66-67. The Petitioner points to no other occasion in which he was removed to the observation room nor where he was prohibited from consulting with counsel.

As stated previously, the Court in McCleskey held that Rule 9(b) provides that a second or successive petition for federal habeas relief which raises claims that could have been raised in an earlier federal habeas petition should be dismissed unless the petitioner can demonstrate both cause for his failure to present the claim in the earlier petition and resulting prejudice.[1] The Petitioner directs this Court to nothing that would demonstrate cause for failure to have previously raised this issue. As previously noted, the facts serving as the basis for this claim were clearly ascertainable from the Trial Record. Therefore,

[1] The Court recognizes that this claim is also procedurally barred. The Texas Court of Criminal Appeals found that the trial court's findings of fact and conclusions of law as to this claim, in which the trial court found error was not preserved, were supported by the record. Ex Parte Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991). The cause and prejudice standard still applies. Petitioner fails to demonstrate cause for failure to preserve error.

Petitioner's only door to relief on this claim hinges on whether this claim implicates a fundamental miscarriage of justice. See McCleskey at 1470.

The Court finds nothing in this claim implicating a fundamental miscarriage of justice. The Petitioner identifies no constitutional violation in this claim which "probably has caused the conviction of one innocent of the crime." McCleskey, id. The Court appreciates an accused's basic right to be present in the courtroom during all stages of a trial under the Sixth Amendment. However, this right does not allow a defendant to disregard proper courtroom decorum nor to disrupt the conduct of trial proceedings. As the Supreme Court stated in Illinois v. Allen, 397 U.S. 337, 343; 90 S.Ct. 1057, 1060-1061 (1970) *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684 (1970).

> Although mindful that courts must indulge every reasonable presumption against loss of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

In Petitioner's trial, he was briefly placed in an observation room and allowed to return, enabling him to participate in his defense. The Petitioner points to nothing which demonstrated a constitutional violation. Therefore, this claim constitutes an



abuse of writ and should be dismissed.

REQUEST FOR EX PARTE HEARING FOR EXPERTS AND INVESTIGATORS

Nothing in the Petition indicates the necessity of this Court holding an ex parte hearing of the appointment of experts and investigators for Petitioner.

CONCLUSION

For the foregoing reasons the Court is of the opinion that the Respondent's Motion to Dismiss pursuant to Rule 9(b) should be GRANTED as to Petitioner's claims for relief Numbers II, III, IV and V. The Court is further of the opinion that the Respondent's Motion for Summary Judgment as to the portions of Claim Number I, which relies on constitutional Brady violations should be GRANTED and that the Court should retain jurisdiction of the remaining portion of Petitioner's Claim Number I in which he alleges he is actually innocent and his execution would violate his eighth and fourteenth amendment rights until noon, February 21, 1992 at which time this Court will DISMISS said claim without prejudice provided Petitioner shall have filed by then the appropriate application with the state trial court with his constitutional claim of alleged actual innocence along with his evidence including his recently acquired evidence on said issue. If same be filed sooner said DISMISSAL shall take effect at the time of filing of said application. In the event that this issue would not be found of sufficient grounds for granting a stay of execution, this Court, as an alternative and independent grounds for granting the stay,

would note that Petitioner argues that he has not been provided a full and fair hearing as he alleges is constitutionally required since no evidentiary hearing was provided by the state trial court judge after he submitted some affidavits and this Court would therefore grant a stay pending the Fifth Circuit Court of Appeals opinion in May v. Collins, No. 91-6273 which raises similar issues as when an evidentiary hearing is required where, as here, the evidence is also a claim of actual innocence and affidavits are involved. The Court is also of the opinion that in order to accomplish this the Motion for Stay of Execution should be GRANTED as per the order of even date herewith.

The Clerk shall send a copy of this Memorandum to counsel for Petitioner and counsel for Respondent.

Done this 17th day of February, 1992 at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE